

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 121 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

DESAI VISHNUBHAI FULABHAI

Versus

O.L. OF ARBUDA MILLS

Appearance:

1. COMPANY APPLICATION No. 121 of 2005
MR HM PARIKH for Petitioner No. 1-5
MR RM DESAI for Respondent No. 1
MR DS VASAVADA for Textile Labour Association
MR INDRAVADAN PARMAR for I.D.B.I.
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CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 09/05/2005

ORAL JUDGEMENT

The applicants have taken out this Judges'
Summons seeking direction from this Court to the Official

Liquidator to hand over vacant and peaceful possession of the lands bearing Survey Nos. 405 & 408 situated in the sim of village Rakhial, Tal. Daskroi, Dist. Ahmedabad and seeking further direction to the Official Liquidator to disclaim the said lands in favour of the applicants as per Section 535 of the Companies Act, 1956. The applicants have also sought for the direction to the Official Liquidator to make payment of arrears of rent due and payable by M/s. Arbuda Mills (Company in liquidation) to the applicants in view of the Lease Deed and the order passed in the Rent Suit. The applicants have further prayed that during the admission, hearing and final disposal of this application, the Official Liquidator may be restrained from alienating, transferring, creating any interest and/or mortgaging and/or leasing and/or licensing and/or dealing in any manner whatsoever in respect of the lands in question.

2. An affidavit is filed by Shri Madhusudan N. Patel, the applicant No. 6 herein, in support of the Judges' Summons. Mr. H.M. Parikh, learned advocate appearing for the applicants has submitted that the applicants are the owners of the lands in question and the said land was leased in the year 1929 to Lalbhai Trikamlal Mills Ltd. through its Agent Mr. Chinubhai Lalbhai on permanent lease by Regd. Deed dated 13.07.1929 at an yearly rent of Rs.3,653/- by its original owners, and thereafter, the predecessor-in-title of the applicants had purchased the said property along with the leasehold rights from the original owners by Regd. Sale Deed dated 24.07.1934. The lessee had committed breach of the conditions of the Lease Deed and hence, the lease deed was terminated and notices were issued to the lessee and thereafter the applicants had filed H.R.P. Suit No. 1200/75 in the Small Causes Court on 16.08.1977 at Ahmedabad against the lessee. In the said suit, the decree was passed by the Small Causes Court in terms of the settlement entered into between the parties.

3. Mr. Parikh has further submitted that the terms of the Lease Deed were settled in the said compromise and it was declared that Arbuda Mills would be a tenant of the property and the applicants and their predecessor-in-title are the landlords of the said property. As the decree was passed by a competent Court, the terms and conditions mentioned in the Lease Deed did not survive and the lessee was governed by the terms and conditions of the settlement as per the decree of the

Court. He has further submitted that Arbuda Mills had become the statutory tenant of the applicants. The winding up proceedings have been started against the Mills Company and the applicants have learnt that the respondent is going to sell the land and structure of the company in liquidation along with the leasehold and freehold rights. Since the company in liquidation had become the statutory tenant of the applicants and in view of the provisions of Section 15 of the Bombay Rent Act, the respondent had no authority to sell the aforesaid lands of which the company in liquidation was holding a right of statutory tenant of the applicants and hence, the action on the part of the respondent in selling the aforesaid lands, is illegal and without jurisdiction.

4. Mr. Parikh has further submitted that the respondent has not paid the rent of the property in question since 1994 and as the company was in arrears of rent for more than six months, the applicants have become entitled to claim back possession of the aforesaid property. The Company in liquidation being the statutory tenant and since the land is not required for the purpose of affairs of the Company, and, as the company cannot sub-let, assign or transfer its tenancy rights, possession of the lands in question is required to be handed over to the applicants. The Company being the statutory tenant could not have created any charge over the aforesaid property. The said property cannot be said to be under any charge nor it can be sold in liquidation proceedings. The tenanted property cannot be said to be the property of the tenant and it cannot be treated as the assets of the Company. Since 1996, the applicants have been writing letters to the Official Liquidator for recovery of the rent amount due to the applicants from the Company but the same have not been replied to by the O.L. In this view of the matter, he has urged before the Court that the Liquidator should be directed to hand over the possession of the land in question to the applicants.

5. In support of his submission, Mr. Parikh has relied on the decision of the Hon'ble Supreme Court in the case of RAVINDRA ISHWARDAS SETHNA AND ANOTHER V/S. OFFICIAL LIQUIDATOR, HIGH COURT, BOMBAY AND ANOTHER, AIR 1983 SUPREME COURT 1061 wherein it is held that the statutory tenancy confers the right to be in possession but if the tenant does not require any more the use of the premises, the provisions of the Rent Act and especially Sections 13 & 15 thereof completely prohibit to give the possession of the premises on licence or on

sub-lease. The Court has further observed that where the liquidator of the Company, on its being wound up, took the possession of the premises of the Company and subsequently by the order of the High Court entered into a caretakers' agreement with 'X', and gave possession of the premises to him on compensation and on terms and conditions set out in the agreement, though the business of the Company came to a standstill, the moment it was ordered to be wound up, and it was not the Liquidators' case that he was carrying on business of the Company with the permission of the Court under Section 457, the High Court could not authorize the liquidator to enter into such an agreement and therefore the order of the High Court was liable to be set aside as it was wholly impermissible under the Rent Act. The possession of the premises was ordered to be handed over to the landlord. Based on this decision, Mr. Parikh has submitted that in the present case also, the premises in question was not required by the O.L. and the Company being the statutory tenant, he has no authority to transfer, sale or otherwise dispose of the lands in question.

6. Mr. Parikh has further relied on the decision of the Hon'ble Supreme Court in the case of SINGER INDIA LTD. V/S. CHANDER MOHAN CHADHA AND OTHERS, AIR 2004 S.C. 4368 wherein it is held that it is not open to the Company to ask for unveiling its own cloak and examine as to who are the directors and shareholders and who are in reality controlling the affairs of the Company. This is not the case of the appellant nor could it possibly be that the corporate character is employed for the purpose of committing illegality or defrauding others. It is not open to the appellant to contend that for the purpose of FERA, the American Company has effaced itself and has ceased to exist but for the purposes of Delhi Rent Control Act, it is still in existence. Therefore, it is not possible to hold that it is the American Company which is still in existence and is in possession of the premises in question. On the contrary, the inescapable conclusion is that it is the Indian Company which is in occupation and is carrying on business in the premises in question rendering the appellant liable for eviction.

7. Based on this decision, Mr. Parikh has submitted that it is the company in liquidation which is the tenant and the Secured Creditors to whom the land in question is mortgaged cannot be said to be the owners and they have no right to enforce the security to recover their outstanding dues against the Company in liquidation.

8. Mr. R.M. Desai, learned advocate appearing for the Secured Creditor has submitted that the Lease deed executed in favour of the company in liquidation was for a permanent period and the company in liquidation was not the statutory tenant as contended by the applicants. The applicants are not the original owners of the land. The land in question was purchased by their Predecessors with the leasehold rights of the company now in liquidation. Though the Lease Deed is not produced by the applicants, it is stated in the deed of Conveyance dated 24.07.1934 that the said property was leased in the year 1929 to Lalbhai Trikamlal Mills Ltd. through its agent Mr. Chinubhai Lalbhai on permanent lease and thereafter, the said property was purchased by the Predecessors of the applicants along with the leasehold rights from the original owners. Mr. Desai has further submitted that even in the H.R.P. Civil Suit No. 1200/75, it is mentioned that the property in question was leased to Lalbhai Trikamlal Mills Ltd. by a Lease Deed dated 13.07.1929 and the name of the said company is now Arbuda Mills Limited. It is further stated in the plaint of the suit that the suit property was given to the lessee on the basis of the permanent lease. Even the consent decree passed by the Court also refers to the fact that Arbuda Mills Limited is the permanent lessee of the suit property. The consent decree also refers that the disputes between the parties have been resolved and the plaintiffs have forgone their dispute with regard to the breach of conditions of lease deed. Simply because the suit was filed by the plaintiffs before the Rent Court, the permanent lease would not come to an end and the lessee cannot be considered as statutory tenants.

9. Mr. Desai has further submitted that the Lease Deed in question was a permanent lease. The reliance placed by Mr. Parikh on the decision of RAVINDRA ISHWARDAS SETHNA AND ANOTHER V/S. OFFICIAL LIQUIDATOR, HIGH COURT, BOMBAY AND ANOTHER, AIR 1983 SUPREME COURT 1061 is uncalled for as it is not applicable. He has further submitted that the issue raised by the applicants in the present application is squarely covered by the decision of this Court in the case of LEGAL HEIRS OF DECEASED FAKIR CHAND AMBARAM PATEL V/S. O.L. OF AMRUTA MILLS LIMITED AND OTHERS, 2002 (3) G.L.H. 367 wherein it is held that on overall reading of the Lease Deeds which have come on record, it is apparent that the terms of the lease are mostly permanent or in perpetuity, or for long fixed periods or at least till life time of the Company.

The position therefore which emerges is that the contract which was entered into by the lessors with the Company subsists. Once that is so, the position in law is settled that the tenant, viz. the Companies herein, would be entitled to seek protection under the contract dehors the provisions of the Rent Act. In none of the cases, was it contended or pointed out that there is any breach of express condition which would entitle the landlord to invoke forfeiture. Even if nonpayment of rent for a particular period could be treated as a breach of one of the conditions the terms of the lease deeds do not envisage forfeiture. For the sake of argument, in a given case, even if it is to be found that nonpayment of rent would entitle the landlord to seek determination of the lease it would be open to the Court to relieve from forfeiture by issuing appropriate directions. However, all these aspects will have to be taken into consideration, in each individual case, after the landlord applicant is able to establish not only nonpayment of rent, but entitlement of forfeiture and further that he has served a notice for such forfeiture. After considering the various judgments including the one which was relied on by Mr. Parikh i.e. RAVINDRA ISHWARDAS SETHNA AND ANOTHER V/S. OFFICIAL LIQUIDATOR, HIGH COURT, BOMBAY AND ANOTHER, AIR 1983 SUPREME COURT 1061, the Court has summarised inter alia that (i) Leasehold interest is an intangible asset, which is valuable in nature though the valuation may differ from case to case depending upon the unexpired period of lease. (ii) Such an asset is transferable subject to the same terms and conditions as may be stipulated in the lease deed. (iii) Once there is a contract which has not been determined, the relationship of the parties to the contract continues to subsist till the period for which the contract is in existence subject to an express condition to the contrary. (iv) There is a distinction between the point of time when an order of winding up is made and at the point of time when an order of dissolution is made, the company continues to exist between the two termini. (v) A condition in the lease deed permitting a lessee to give back the possession as and when the lessee chooses to do so cannot be converted into an obligation entitling the lessor to seek possession. (vi) A condition in the lease deed by way of requirement to pay rent, per se, does not create an onerous covenant, once readiness and willingness is shown by the lessee, or on its behalf, to discharge such obligation.

10. Based on the aforesaid judgment, Mr. Desai has

submitted that since the Lease Deed in question is the perpetual lease, there is no question of claiming back the possession of the properties in question. He has further submitted that there is no substance in the contention raised by Mr. Parikh that the Company being a statutory tenant of the applicants, could not have created any charge over the properties in question. It is also not correct to state that the property cannot be said to be under charge nor it can be sold in liquidation proceedings. The charge in favour of the Secured Creditor was created as a result of the mortgage. So far as the documents of charge is concerned, there was registration of the charge with the Registrar of Companies in consonance with the provisions contained in the Indian Registration Act. The landlord never objected to the registration of the charge in favour of the Secured Creditors. The leasehold rights are transferrable and there was no prohibition. Even this issue was also dealt with in the above referred judgment of this Court.

11. Mr. D.S. Vasavada, learned advocate appearing for the Textile Labour Association and Mr. Indravadan Parmar, learned advocate appearing for I.D.B.I. have also supported the arguments and submissions made by Mr. Desai.

12. After having heard learned advocates appearing for the respective parties and after having gone through the application, and after having considered the authorities cited before the Court, the Court is of the view that the lease in question is a permanent lease and averments to this effect are made in the Deed of Conveyance produced by the applicants. Not only this, the plaint of the suit also states that the lease is of permanent nature and even the compromise decree is also confirming these facts. Thus, there is no doubt or dispute about the fact that the lease in question is the permanent lease. There is no much substance in the argument of Mr. Parikh that no sooner the suit is filed by the applicants against the company in liquidation, the lease has come to an end and the company in liquidation has become the statutory tenant. The consent decree itself makes it clear that the plaintiffs have given up their objections with regard to the breach of terms of the Lease Deed. Since the leasehold rights are valuable rights and are transferrable, the company in liquidation was well within its rights to create charge or mortgage such property with the lenders so as to get the financial assistance from them. The lenders have every right to

enforce their security for the purpose of recovery of their dues.

13. The decisions of the Hon'ble Supreme Court relied upon by Mr. Parikh are not applicable to the fact of the present case. This is not a case of statutory tenancy and hence, ratio of the judgment of the Hon'ble Supreme Court in the case of Ravindra Ishwardas Shethna (Supra) is not applicable. Likewise, the decision of the Hon'ble Supreme Court in the case of Singer India Ltd. (Supra) has also no application to the facts of the present case as in that case, the Hon'ble Supreme Court was concerned with the applicability of the provisions contained in Section 14(1)(b) of the Delhi Rent Control Act and the Hon'ble Supreme Court has held that its applicability depends upon occurrence of a factual situation, namely, sub-letting or assignment or otherwise parting with possession of the whole or any part of the premises by the tenant. Whether it is a voluntary act of the tenant or otherwise and also the reasons for doing so are wholly irrelevant and can have no bearing. In that case, the landlord filed an eviction petition on the ground that the tenant, a American Company, without obtaining any written consent from the landlord, had parted with the possession of the premises in dispute in favour of Indian Company Limited and it was the said Company which was in exclusive possession of the premises and thereby it was liable for eviction in view of S. 14(1)(b) of the Act. The Court has further held that even if there is an order of the Court sanctioning the Scheme of amalgamation under Section 391 & 394 of the Companies Act whereunder the leases, rights of tenancy or occupancy of the Transferor Company get vested in and become the property of the Transferee Company, it would make no difference in so far as the applicability of S.14(1)(b) is concerned, as the Act does not make any exception in favour of a lessee who may have adopted such a course of action in order to secure compliance of law. In the present case, the Company in liquidation was not the statutory tenant and it has not been pointed out that there is any prohibition against the sale, transfer or creation of any charge over the property which has been leased out to the Company in liquidation.

14. Considering the overall view of the matter and keeping in mind the various decisions cited before the Court, the Court does not see any justification in granting the main relief of possession claimed by the applicants in the present Judges' Summons. The applicants are at the most entitled to receive their rent

as per the provisions contained in the Lease Deed and for that purpose, the Court hereby directs the O.L. to ascertain the factual position and to pay the rent which is outstanding. The O.L. shall also ascertain as to whether the applicants are the legal heirs and successors and thereby they are the real claimants and for that purpose, the O.L. may ask for the relevant documents from them and if necessary, the affidavits to that effect also. If there is any dispute with regard to the claimants or payment of rent, the O.L. shall file his report before this Court and seek appropriate direction in this regard. It is made clear that the O.L. has already filed one report before this Court for confirmation of sale of this property and hence, the O.L. is liable to pay the rent to the applicants till the sale is confirmed in favour of the auction purchaser and possession is handed over to such auction purchaser thereafter, it will be the liability of the auction purchaser to pay such rent to the land owners.

15. With the aforesaid directions and observations, the present application is accordingly disposed of without any order as to costs.

[K.A. PUJ, J.]

#Savariya#
